

1 UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF VIRGINIA
3 NORFOLK DIVISION
4 Civil Action No. 2:18cv530

5 CSX TRANSPORTATION, INC.,
6 individually and on behalf
7 of NORFOLK & PORTSMOUTH BELT
8 LINE RAILROAD COMPANY,

9 Plaintiff,

10 vs.

11 NORFOLK SOUTHERN RAILWAY
12 COMPANY, et al.,
13 Defendants.
14 _____/

15 Monday, March 22, 2021
16 9:35 a.m. - 5:55 p.m.



17 VIDEOTAPED DEPOSITION OF DR. HOWARD P. MARVEL
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21 Taken via Zoom videoconference on behalf of the
22 Defendant before Elizabeth Cordoba, RMR, CRR, FPR,
23 Notary Public in and for the State of Florida at
24 Large, pursuant to Defendant's Notice of Taking
25 Deposition in the above cause.

1 Q. Can you think of any category of cargo that can
2 only go through NIT and not VIG? Putting aside what you
3 have said about capacity constraints.

4 A. I -- I don't know of any factor that would
5 prevent one or the other being used. I have not studied
6 whether if there is any refurbished facilities or anything
7 like that. I don't know.

8 Q. Did you talk to any ocean carriers?

9 A. I did not.

10 Q. Why not?

11 A. Well, I am a great believer in more is
12 preferred to less when it comes to information. And it
13 would have -- I would have -- I would have enjoyed that, I
14 think.

15 Q. You said that you concluded that ocean carriers
16 were harmed by the conduct alleged in this case. Wouldn't
17 it be a good idea to hear directly the views of the ocean
18 carriers?

19 A. I would find that valuable.

20 Q. Let me take you to your original report, which
21 is Exhibit 1, tab 4, and ask you to go to paragraph 54.

22 A. I am going to read that. It will take me a
23 second.

24 Okay.

25 Q. Okay. So you conclude in paragraph 54 that

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2

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A. That's correct.

4

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Q. Did you study the costs that underlie the NPBL switch rate?

6

A. Only in passing.

7

Q. What did you consider?

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A. I was looking at a -- as is indicated in the paragraph, I was looking at a comparison between rates that were available at other carriers that were similarly situated.

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13

14

Q. Do you agree that you would need to know more about how those switch rates are set before you can draw any comparison?

15

MR. JUSTUS: Objection to form.

16

THE WITNESS: No. I wouldn't agree to that.

17

BY MS. REINHART:

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Q. Well, do you agree that you would need to understand the costs underlying the switch rates between -- before you could make a comparison between them?

22

MR. JUSTUS: Objection. Asked and answered.

23

24

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THE WITNESS: I -- I agree that I can make the comparisons by comparing the rates actually charged, as long as these are for similarly situated services.

1 BY MS. REINHART:

2 Q. What does that mean, "similarly situated
3 services"?

4 A. Well, if you had a switch rate for a very
5 different sort of purpose than connecting a railroad to a
6 terminal, that could lead to a misleading comparison. Or
7 if there was very little traffic at that rate, that could
8 lead to a misleading comparison.

9 But the comparisons that I have I think are
10 sufficient to show that the NPBL rate is, as I say,
11 extraordinarily high.

12 Q. For your comparison, what do you have besides
13 the nominal dollars that each of these short lines
14 charges?

15 A. I have -- that is what I have. I have the
16 dollars that each of these charges -- each of the lines
17 charge.

18 I would want to make sure that there were not
19 additional services included in one or the other, but I
20 don't believe that there are. I believe they are pretty
21 comparable.

22 Q. So what if the costs of operating the short
23 line are higher for the NPBL than they are for, let's say,
24 the Commonwealth railroad? Isn't that something you would
25 want to know before making your comparison?

1 MR. JUSTUS: Objection. Assumes facts not in
2 evidence.

3 THE WITNESS: Well, if you just showed me
4 evidence that NPBL had far higher costs, for example,
5 I would certainly want to understand why those costs
6 were so high before I would even be even remotely
7 interested in figuring out whether they would have to
8 lead into the rate per rail car. So I would not be
9 terribly concerned about that issue.

10 BY MS. REINHART:

11 Q. So -- well, let's put aside the other -- other
12 short lines and focus on NPBL.

13 Do you have an understanding of what the NPBL's
14 costs of operation are in comparison to the switch rate
15 that it charges?

16 A. Well, again, you have to define what you're
17 talking about in terms of costs. What I am interested in
18 is whether or not NPBL could handle the additional traffic
19 it would get from CSX at a price that would cover the
20 additional -- those additional costs.

21 Q. Okay. So you -- you would -- you would agree
22 that the NPBL switch rate should cover its costs?

23 A. Appropriately defined, yes.

24 Q. And how would you define costs so that they
25 would be appropriate?

1 A. Well, as I have suggested, you wouldn't want to
2 include in costs anything that was subject to being
3 artificially inflated or otherwise manipulated. They have
4 to be costs of handling that additional traffic. And you
5 would compare those to the amount that was being offered
6 to handle that -- to handle the rail car additional
7 traffic.

8 Q. Do you have any reason to believe there are
9 costs that are involved in this case that are artificially
10 inflated or otherwise manipulated?

11 A. Well, I am just saying that that 210 per rail
12 car is, as I put it, extraordinarily high compared to
13 other terminal railroads on the east coast.

14 So I would be interested in seeing factors that
15 look as if they might lead to a higher switching rate --
16 switching costs for NPBL than those other firms.

17 Q. Did you ask counsel to provide you with
18 information from the NPBL that would give you the answer
19 to your question about what's -- what's contained in that
20 cost?

21 A. I took the NPBL submissions as given and worked
22 from those.

23 Q. What does that mean?

24 A. It means what I said.

25 Q. Did you have access to NPBL cost information so

1 that you could assess the -- the reasonableness of the
2 switch rate that they set?

3 A. I -- I don't recall exactly what we had.

4 Q. You did not do the analysis of whether NPBL's
5 switch rate is reasonable in light of its costs, right?

6 A. I thought that the appropriate comparison was
7 whether NPBL's switch rate was extraordinarily high when
8 compared to other terminal railroads on the east coast.
9 That was my conclusion, that it was, and that is what I
10 looked at.

11 Q. And you did that without having information
12 about any of those terminal railroads as to how their
13 switch rates were set and what the costs are that underlie
14 those switch rates, right?

15 A. I did not have that information.

16 Q. I don't think we have introduced yet the
17 Matthew Wright report. If I could ask you to go to your
18 envelope No. 2, Professor Marvel.

19 MS. REINHART: And we will mark this as
20 Exhibit 4.

21 (Exhibit 4, Expert Report of Matthew B. Wright,
22 Ph.D., was marked for identification.)

23 THE WITNESS: I have that document in front of
24 me now.

25 BY MS. REINHART:

1 Q. Okay. Great.

2 There is a lot of talk about railroad switching
3 rates. Outside of this case, have you ever been hired as
4 an expert on railroad switching rates before?

5 A. No, sir.

6 Q. Okay. Outside of this case, have you ever
7 compared railroad switching rates before?

8 A. No, sir.

9 Q. Okay. And if I understand your -- your
10 occupation correctly, you're -- you're both a professor
11 and a consultant; is that right?

12 A. I am a retired professor, and since retiring, I
13 have done somewhat more expert witness work than I did
14 before my retirement.

15 Q. Okay. And in that role, do you regularly deal
16 with railroad switching rates at all?

17 A. I do not.

18 Q. And when you were a professor, did you
19 regularly deal with railroad switching rates at all?

20 A. I did not.

21 Q. Have you ever held yourself out as an expert on
22 railroad switching rates?

23 A. I am an economist, not an expert on a
24 particular industry.

25 Q. Okay. So is that a no?

1 A. That is a no.

2 Q. Thank you, sir.

3 Are you a member of any railroad industry
4 groups?

5 A. No, I am not.

6 Q. Okay. Do you subscribe to any railroad
7 industry publications?

8 A. Not for a number of years.

9 Q. How long has it been?

10 A. Maybe 40.

11 Q. Okay. What was the publication 40 years ago?

12 A. Trains and model railroading, both.

13 Q. Have you ever costed out a railroad move?

14 A. No, I haven't.

15 Q. You don't consider yourself an expert on
16 railroad operational costs either, do you?

17 A. No, I do not.

18 Q. And if I understand this correctly, you live in
19 Indiana; is that right?

20 A. That is correct.

21 Q. Okay. And you -- you were a professor at Ohio
22 State, right?

23 A. Yes, indeed.

24 Q. Have you ever been to Norfolk?

25 A. Yes, I have.

1 A. That is.

2 Q. Okay. I'm going to jump around exhibits
3 because I think it will help us.

4 If you can go to your first report, which I
5 think is Exhibit 1. And turn to paragraph 60 on page 30,
6 please. Just let me know when you have finished reading
7 it.

8 A. I have finished reading it.

9 Q. Okay. The first sentence of paragraph 60 on

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 Did I read that correctly?

14 A. You did.

15 Q. You agree with me that that sentence does not
16 say anything about the Belt Line impeding CSX on-dock
17 access, correct?

18 A. That sentence does not say anything about the
19 Belt Line.

20 Q. Okay. And am I right that the Belt Line has to
21 coordinate the scheduling of the moves to NIT with NS
22 because it travels over NS track?

23 A. Yes. You are correct.

24 Q. Okay. And based on this paragraph, you looked
25 at the correspondence back and forth between the Belt Line

1 and CSX where the Belt Line was asking for an operating
2 window over that track, correct?

3 A. That is correct.

4 Q. Okay. And in the middle of the paragraph, it

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]

8 Do you see that?

9 A. I do.

10 Q. Did I read that correctly?

11 A. You did.

12 Q. Again, that refers only to NS action, right,
13 and not the Belt Line?

14 A. Yes, that is correct.

15 Q. Okay. And the -- and the Belt Line, at least
16 based on your recitation, here is doing what it is
17 supposed to do, isn't it, in asking for a window when CSX
18 wants to run a train. Is that correct?

19 A. The Belt Line was set up to provide equal
20 access to the rail carriers serving the port, so --

21 Q. And the way they do that is by asking NS for
22 access when CSX makes a request; is that right?

23 A. They did indeed ask -- ask NS for access,
24 that's correct.

25 Q. Okay. And that is what it did in 2015 in the

1 Q. Okay. And you go on in your footnote to
2 identify a lower utilization rate that you say was used in
3 one of the documents that Mr. Crowley relied on, and that
4 lower rate is 1.67. Do you see where I am reading?

5 A. Yes, I do.

6 Q. Okay. As far as I can tell, that is about the
7 lowest utilization rate that shows up in your footnote as
8 a possible utilization rate for CSX containers. Is that
9 right?

10 A. That is right.

11 Q. Okay. So let's do the same exercise with that
12 lowest utilization rate. If that, in fact, were the
13 utilization rate, what, then, is the average cost per
14 container on the Belt Line?

15 A. I will rely on your calculator yet again,
16 Mr. Snow.

17 Q. Okay. Well, the math would again be \$210
18 divided by 1.67; is that right?

19 A. That is correct.

20 Q. And on my calculator, that shows \$125.75 per
21 container on the Belt Line. Does that seem correct to
22 you?

23 A. I'm willing to take your computer -- your
24 calculator's word for that one.

25 But I would emphasize that this is --

1 comparison to the drayage rate is not a quality constant
2 comparison because the drayage involves a separate
3 operation to get the container either onto or off of the
4 chassis at the port terminal, and then to convey it to the
5 yard for CSX, and then to get it onto a train to send it
6 on beyond there, as opposed to making up the train at --
7 having the NIT personnel make it up at NIT.

8 So you have delay and you have various and
9 sundry other problems that are associated with drayage
10 that are not present if you are -- if you have a more
11 effective on-dock service, which is preferred throughout
12 the industry to drayage.

13 Q. And we will unpack that in just a moment. But
14 if you will indulge me.

15 So say we use the 1.67 containers, the lowest
16 utilization rate that shows up on your CSX footnote, and
17 we get to a rate per container on the Belt Line of
18 \$125.75, that is still lower than the unsubsidized drayage
19 rate of 130; is that correct?

20 A. It is lower than 130, that is correct.

21 Q. Okay. And so if the Belt Line, based on either
22 of these utilization rates, is lower than the unsubsidized
23 drayage rate, and if drayage is, in fact, inferior, like
24 you were saying, why wouldn't CSX use the Belt Line
25 instead of drayage?